79-765

No.

Supreme Court, U. S.
FILED
NOV 15 1979
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

DOUGLAS WARREN WEBSTER,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body corporate and politic; WARREN H. BACON, individually and as a member of the Board of Education of the City of Chicago; MRS. DAVID CERDA, individually and as a member of the Board of Education of the City of Chicago; BERNARD S. FRIEDMAN, individually and as a member of the Board of Education of the City of Chicago; MRS. LOUIS A. MALLIS, individually and as a member of the Board of Education of the City of Chicago; MRS. CAREY B. PRESTON, individually and as a member of the Board of Education of the City of Chicago; MRS. WILLIAM L. ROHTER, individually and as a member of the Board of Education of the City of Chicago; and MRS. W. LYDON WILD, individually and as a member of the Board of Education of the City of Chicago,

Respondents.

Decided in the United States Court of Appeals for the Seventh Circuit, Nos. 78-1978, 78-2032

PETITION FOR WRIT OF CERTIORARI

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REPORT OF OPINIONS

This case was first heard and decided by the District Court for the Northern District of Illinois, Eastern Division, reported at 443 F.Supp. 670, decided December 23, 1977.

The case was then heard and decided by the United States Court of Appeals for the Seventh Circuit, reported at 599 F.2d 793, decided May 22, 1979, rehearing denied, June 19, 1979.

The opinions of the District Court and Court of Appeals are appended to this Petition.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Seventh Circuit decided this case and entered judgment on May May 22, 1979.

Rehearing was denied June 19, 1979.

This Court on September 14, 1979 entered an Order extending the time to file a Petition for Writ of Certiorari in this case to and including November 16, 1979.

This Court has jurisdiction to entertain a Petition for Writ of Certiorari in this case pursuant to Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED FOR REVIEW

The sole question presented for review herein is whether Douglas Webster was denied a constitutionally protected property right without due process of law by the decision of the Chicago Board of Education to refuse to appoint him to a principalship.

STATUTES CONSTRUED

Portions of the Illinois School Code Ill. Rev. Stat. 1977, ch. 122

§ 34-8.2. Local Nominating Committees. A. Before the general superintendent shall recommend or the board shall vote on the appointment of a principal, the general superintendent and board may obtain the nomination of a person or persons to fill the position of principal by a local nominating committee.

B. A local nominating committee, when authorized by board rules and regulations, may consider, interview and nominate only those persons for the position of principal who appear on the appropriate eligibility list prepared by the board of examiners or those principals who consent to be considered for a transfer. The recommendations of the local nominating committee shall not discriminate against any person based upon race, color, creed, national ancestry, sex, ethnic heritage or religious beliefs.

C. The board may adopt rules and regulations regarding the formation of and procedures to be followed by local nominating committees; these rules and regulations shall assure that at least 60% of the members of each committee shall be parents or guardians of children in the affected school.

§ 34-83. Board of examiners—Certificates—Examinations. A board of 3 examiners shall examine all applicants required to hold certificates to teach and the board of education shall issue gratuitously to those who pass a required test of character, scholarship and general fitness, such certificates to teach as they are found entitled to receive. The board of examiners shall consist of the general superintendent a schools and 2 persons approved and appointed by the board of education upon the nomination of the

general superintendent of schools. The board of examiners shall hold such examinations as the board of education may prescribe, upon the recommendation of the general superintendent of schools and shall prepare all necessary eligible lists, which shall be kept in the office of the general superintendent of schools and be open to public inspection. Members of the board of examiners shall hold office for a term of 2 years.

§ 34-84. Appointments and promotions. Appointments and promotions of teachers, principals and other educational employees shall be made for merit only, and after satisfactory service for a probationary period of 3 years (during which period the board may dismiss or discharge any such probationary employee upon the recommendation, accompanied by the written reasons therefor, of the general superintendent of schools) appointments of teachers and principals shall become permanent, subject to: (1) termination by compulsory retirement at the age of 65 years; (2) the rules of the board concerning conduct and efficiency; and (3) removal for cause in the manner provided by Section 34—85.

When any teacher or principal who has been promoted to the position of assistant or district superintendent or a member of the board of examiners is relieved of the duties of such position, he shall be reinstated in the position from which he was promoted.

"Teachers and principals" as used in this article means all members of the teaching force except the general superintendent of schools, assistant and district superintendents and members of the board of examiners.

STATEMENT OF THE CASE

Procedural History

Douglas Webster instituted this lawsuit in the District Court for the Northern District of Illinois, Eastern Division, after he was denied a principalship in the Chicago Public Schools by the Board of Education. Mr. Webster asserted claims of deprivation of due process of law, unlawful employment practice and race discrimination, under Title 42, United States Code, Sections 1981, 1983, 2000(e)-3, and 2000(e)-5. Jurisdiction was invoked pursuant to Title 28, United States Code, Sections 1331, 1343(3) and 1343(4).

The matter was tried by the court, without a jury, and judgment was entered, on June 16, 1978, in favor of plaintiff and against the Board of Education and eight individual members thereof.[1]

The District Court held that Mr. Webster's due process rights were violated when he was denied appointment to a vacant principalship on the ground that he had been arrested and indicted for a crime, even though the indictment was dismissed, because Mr. Webster was not provided a hearing before the Board of Examiners before he was disqualified from appointment. The District Court ordered that he recover back-pay in the amount of $43,982.80 and an additional amount of salary until so appointed; further, that he be awarded the amount of $125,000.00 as damages, and finally, that he be awarded $49,271.40 as attorney's fees, plus an amount equal to his costs.

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[1] The remaining members of the Board voted in favor of Mr. Webster's appointment, and along with James Redmond, the General Superintendant of Schools, were dismissed from the lawsuit.

On May 22, 1979, the United States Court of Appeals for the Seventh Circuit reversed the decision of the District Court. A Petition for Rehearing was denied on June 19, 1979.

STATEMENT OF FACTS

Plaintiff Douglas Warren Webster is a Negro citizen of the United States and a lifelong resident of the City of Chicago. He has been employed by the Board of Education of the City of Chicago since 1953. While in the employ of the Board, he has been a Teacher, Master Teacher, Assistant Principal and Acting Principal. He has taught in conventional schools and in schools for the socially maladjusted. In 1971 he was a teacher in the Cook County Jail School maintained by the Board of Education of the City of Chicago where his pupils included jail inmates.

Webster holds degrees of Bachelor of Arts and Master of Arts in Education. In addition, he has accumulated in excess of 36 credit hours beyond the Master's degree level.

On August 25, 1970, he took and passed the certificating examination for principals in the Chicago public school system. Webster still holds his principal's certificate and is legally entitled to be on the principal's eligibility list and has the rating of a superior teacher.

On January 23, 1971, Webster was arrested in his apartment by officers of the Chicago Police Department, who also seized a ring alleged to be part of the proceeds of a robbery. Webster was subsequently indicted for knowingly obtaining unauthorized control over a ring which had been included in a quantity of jewelry taken

in a robbery of a jewelry store. On March 22, 1971, all criminal charges arising out of the arrest and indictment of Webster were stricken by order of Court after it was determined that the ring was seized without a search warrant.

On January 26, 1971, Webster was suspended from his teaching position at the Cook County Jail School. Subsequent to the March 22, 1971 dismissal of criminal charges, Webster demanded reinstatement to his teaching job.

On April 7, 1971 Webster's attorney demanded his reinstatement or a statutorily mandated hearing.

In May, 1971 he caused a mandamus action to be filed against the Board in the Circuit Court of Cook County, Illinois demanding reinstatement to his teaching position.

The Board's administrative officers decided that there was insufficient evidence to support a charge of conduct unbecoming a teacher against Webster. At no time were charges of conduct unbecoming a teacher ever filed against Webster by the Board, nor did the Board ever afford Webster a hearing on charges related to his arrest.

In August, 1971 the Mandamus action was settled on the basis of Webster's reinstatement to his teaching position with full back pay. On August 11, 1971, the Board rescinded Webster's suspension.

Upon his reinstatement, Webster was transferred to his present teaching position at the Whittier School, with a substantial decrease in salary to Webster for each year since September, 1971.

In the Chicago public school system, the standards for character and fitness imposed on teachers are the same as those required by the Board of principals. In order for a teacher to be considered eligible for promotion to the position of a principal, he or she must be on a certified list of eligibles issued by the Board of Examiners.

On January 13, 1971, the Board purported to establish a procedure for the appointment of elementary school principals which included the requirement that each public school in the City of Chicago have a local advisory council made up of teachers, Parent-Teacher Association members, Concerned Parents and other community groups. Upon a vacancy occurring in a school's principalship, a principal selection committee of the local advisory council had the right to interview eligible (certified) applicants and select a person in accordance with the guidelines promulgated by the Board.

After interviewing Webster and other candidates, the Delano School Council selected Webster as their principal nominee. Prior to selecting Webster, the Council was told by him of his arrest and prosecution, and the dismissal of all criminal charges.

District Superintendent Caruso forwarded Webster's name up the administrative chain of command used for the appointment of principals to General Superintendent Redmond. Webster's name was approved by all persons in this chain—District 25 Superintendent Angeline Caruso, Area Associate Superintendent George W. Connelly, and Deputy Superintendent of Schools Manford Byrd, Jr., and the name of Douglas Warren Webster was presented to the Board of Education at its Executive Session of January 14, 1972 with the recommendation of

General Superintendent Redmond that Mr. Webster be apointed principal of the Edward C. Delano Elementary School.

During the executive session, the Deputy Superintendent related Webster's qualification and distributed a two-page memorandum summarizing Webster's performance as a teacher and qualifications to be a principal of the Delano School. He added that Webster had been previously arrested and prosecuted, had been suspended from teaching duties, had the criminal charges dropped and had been reinstated to his teaching duties. During the Board's deliberations on Webster's appointment to the vacant Delano principalship, the records relating to Webster's criminal prosecution in the possession of the Law Department were never examined by any of the Board members. The Board attorney, however, told the Board that Webster had gotten off on a "technicality." Deputy Superintendent Byrd assured the Board that the record showed Webster to be a superior teacher and that he had been selected from among three eligible candidates interviewed by the Delano Advisory Council. Area Associate Superintendent Connelly, in response to a direct question, stated that Webster's name was on the principal's eligibility list and had not been removed. He added that on the basis of all information at hand he would approve Webster's appointment as principal.

The Board of Education then voted against Webster's appointment to the principalship of the Delano School.

From the entire record it is clear that the only reason for the vote of those Board members who voted against Webster's appointment as principal was their belief that a man who had been arrested and indicted, but not tried or convicted for the criminal offense of re-

ceiving stolen property did not have the requisite character and fitness to be a principal in the Chicago Public School System.

After the January 14, 1972 executive session, the Principal Selection Committee of the Doolittle East Elementary School Advisory Council interviewed and recommended plaintiff to be the principal of that school, a position that was then vacant.

On April 26, 1972, the Board again met in executive session. A motion was made which asked the question whether the Board would give consideration to Webster's assignment as a principal without prejudice. The motion lost. The General Superintendent of Schools, having construed the January 14, 1972 vote of the Board at executive session, and the vote of April 26, 1972, as precluding the possibility of Webster getting a favorable vote, never thereafter submitted Webster's name to the Board with his recommendation that he be appointed to a principalship. His reason was his thought that there was not a "reasonable likelihood of appointment by the Board." The vote of the Board taken on April 26, 1972 with respect to Webster has never been rescinded, nor has the Board given any other direction to the General Superintendent indicating that it would now consider plaintiff for a principalship, without prejudice.

On November 22, 1974, on a motion made in the Criminal Division of the Cricuit Court of Cook County, and pursuant to a procedure defined in a state statute, the record of Webster's arrest, indictment and prosecution for the charge of receiving stolen property was expunged.

Between 1917 and 1970 the Board of Education appointed all principals in their order of rank as determined by the Board of Examiners.

Webster is the only person holding a valid principal's certificate who had been selected for a vacant principalship by a local school advisory council who had (1) subsequently not been appointed to a vacant principalship by the Board of Education after recommendation by the General Superintendent; and (2) subsequently not been recommended by the General Superintendent for appointment by the Board.

On October 10, 1979, the Illinois Appellate Court filed its opinion in *Maiter* v. *Chicago Board of Education,* No. 77-423 (Ill. App., 1st Dist., Oct. 10, 1979), holding that Section 34-84 of the Illinois School Code grants principal candidates a right to appointment in rank order from the principals' eligibility list promulgated by the Board of Examiners. The court specifically ordered the Board of Education to make appointments, first exhausting the 1970 Eligibility list. Although Webster has never been formally removed from the 1970 list, the Board of Education represented in its brief of Defendants-Appellees in the *Maiter* case that, "As of November, 1977, all persons on the 1970 principal's eligibility list had been appointed or offered appointments on their principal's certificate."

ARGUMENT

DOUGLAS WEBSTER HAD A CONSTITUTIONALLY PROTECTED ENTITLEMENT TO APPOINTMENT TO A PRINCIPALSHIP.

Introduction

Douglas Webster, a superior teacher with more than twenty five years experience, had a constitutionally protected property right in the principal's certificate which qualified him for a principalship in the Chicago Public Schools and a legitimate claim of entitlement to appointment when his name reached the top of the principals' eligibility list. The principal's certificate was issued to him by the independent Board of Examiners for the Chicago Public Schools in August of 1970 based upon his character, scholarship and general fitness pursuant to the Illinois statutory madate of "merit appointment" for the Chicago Public Schools.

Douglas Webster had more than a mere expectation of appointment. Under Illinois law, he had a clear right to appointment and the Board of Education had no discretion to refuse him the position.

The Board of Education's illegal action against Mr. Webster deprived him of the value of his principal's certificate, of the position of principal to which he was entitled and of the salary and benefits accorded to principals in the Chicago Public Schools. As the trial judge, Judge George N. Leighton, found,

> ". . . that when by their vote, members of the Chicago Board of Education denied Webster a school principalship only because he was once arrested and indicted for a felony but not convicted, they deprived him of his property and liberty in violation of the due process clause of the Fourteenth Amendment to the United States Constitution." 443 F.Supp. at 677.

Mr. Webster's principal's certificate was awarded to him only after an enormous investment of time, money and effort necessary to acquire the special qualifications required for certification by the Board of Examiners. With total disregard for Mr. Webster's determined effort and years of dedicated service, the Board of Education deprived him of his state law right to a principalship in a secret session of the Board. Mr. Webster was never provided an opportunity by the Board of Education to speak in his own defense.

In accordance with the guidelines established by this Court in *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); and *Bishop* v. *Wood,* 426 U.S. 341 (1976), this Court must remedy the harm callously worked by the Board of Education. As this Court declared in *Roth,*

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." 408 U.S. at 577.

As this Court further stated in *Perry* v. *Sindermann,*

> "We have made clear in *Roth, supra,* at 571-572, that 'property' interests subject to procedural due process

protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' . . . A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." 408 U.S. at 601.

The District Court after extensive trial of this case properly applied this Court's standards to vindicate Douglas Webster's right to a principalship. The Court of Appeals for the Seventh Circuit, through a serious misunderstanding of the state law basis for the right, has again jeopardized the professional opportunity which Mr. Webster has worked so hard to earn.

A. Section 34-84 of the Illinois School Code Mandated Douglas Webster's Appointment by the Board of Education.

The narrow issue which is presented herein is whether Section 34-84 of the Illinois School Code prohibited the Board of Education from exercising a purely discretionary power to deny Mr. Webster a principalship without a hearing or an independent review of his character and fitness by the Board of Examiners. The Court of Appeals refused to perform the analysis of the state statutory framework necessary to resolve this issue. Rather, the Court of Appeals summarily dismissed as unimportant the rights created by the operative language of Section 34-84 of the School Code, governing appointments to principalships in the Chicago Public Schools, stating as follows:

"In order to resolve the questions before us *we need not definitely decide what the phrase 'for merit only'*

means in Illinois law. It is sufficient if we can state with certainty that, whatever its meaning, it does not create an enititlement to a principalship under Illinois law, and that we can do." 599 F.2d at 801 (emphasis added).

By this statement, the Court of Appeals revealed that it was not prepared to interpret Section 34-84 which governs this case. Ill.Rev.Stat., 1977, ch. 122, §34-84. Nonetheless, without any significant analysis of the history of the statute, the Court of Appeals did, in fact, proceed to impart its own meaning to the controlling phrase by imposing the quoted conclusionary limitation. Despite its disclaimer, the Court of Appeals was interpreting the Illinois law, with disastrous and erroneous results. What makes the Court of Appeals decision even more offensive is that the court was informed that a case was pending in the Illinois Appellate Court which would necessarily interpret definitely the very language which the Court of Appeals was "refusing" to interpret. That case is *Maiter* v. *Chicago Board of Education,* No. 77-423 (1st Dist., Oct. 10, 1979), decided very shortly after the decision of the Court of Appeals in this case.

The watershed 1917 revision of the Illinois School Code, known as the Otis School Law, introduced the requirement of "merit appointment" into the Chicago Public Schools. In the salient case of *Maiter* v. *Chicago Board of Education, supra,* the Illinois Appellate Court expressly held that the Otis School Law gave candidates for principalships in the Chicago Public Schools *a right to appointment* in rank order from the principals' eligibility list promulgated by the Board of Examiners.

The Illinois Appellate Court's opinion specifically examined the decision of the Court of Appeals in this case

and concluded that the decision of the Court of Appeals was faulty. The Illinois Appellate Court stated,

> "Although we respect the opinion of the Court of Appeals, we note that the decision makes no reference to the doctrine of contemporaneous construction, the doctrine upon which we rely in resolving this issue. For this reason, we decline to concur with the Court of Appeal's holding in *Webster*." Slip opinion at p. 7.

The doctrine of contemporaneous construction is the single most pursuasive rule of statutory construction in Illinois law. *Brandt* v. *Keller,* 413 Ill. 503, 109 N.E.2d 729 (1952); *Nye* v. *Foreman,* 215 Ill. 285, 74 N.E. 140 (1905); *Phoebe* v. *Jay,* 1 Ill. 268 (1828).

The court in *Maiter* also noted that the 1977 amendment to the School Code permitting the Board of Education to obtain recommendations from local nominating committees before making school assignments did not relieve the Board from the mandate of Section 34-84 that candidates be appointed in rank order from the eligibility list. Ill.Rev.Stat., 1977, ch. 122, §34-8.2. The court stated as follows:

> "Because the Chicago Public School system encompasses hundreds of schools, principalship vacancies will occur simultaneously. . . . If the board makes ten appointments from the eligibility list in a certain month, the local nominating committees can interview the next ten persons on the list and relay their preferences to the board. In this manner, not only is the board complying with the statutory requirement of rank order appointment, but it can also consider the particular needs of the individual schools in making an appointment." Slip Opinion at p. 9.

The Illinois Appellate Court went on to conclude its opinion in *Maiter* by remanding the case with directions

that the Board of Education be ordered to make appointments to principalships in rank order from the Board of Examiner's eligibility lists, first exhausting the 1970 eligibility list before proceeding with any subsequent list. *Douglas Webster is the only individual rostered on the 1970 list who has yet to be offered appointment to a principalship.* His *right* to appointment under state law is manifest.

Mr. Webster had a right to appointment based upon his merit as determined by the Board of Examiners pursuant to the landmark Otis School Law. As noted in the order of the trial court in the *Maiter* case, the Otis School Law was enacted, in part, to do away with favoritism, partisanship and cronyism in the selection of principals in the Chicago Public Schools. This represented a marked departure from prior practice. In *People ex rel. Fursman* v. *City of Chicago,* 278 Ill. 318, 116 N.E. 158 (1917), the Illinois Supreme Court had upheld a rule adopted by the Board of Education in 1915 which prohibited membership in or affiliation with labor unions by teachers. The court held that the Board of Education had an absolute discretion concerning appointments in the Chicago Public Schools. The Otis School Law, passed shortly after the *Fursman* case, was intended to reverse the effect of this decision. The Court of Appeals' decision, thus, sets back the progress of Illinois School Law some sixty years!

The Otis School Law conferred upon a newly created Board of Examiners the duty of determining the merit of candidates based upon their "character, scholarship and general fitness." Ill.Rev.Stat. 1977, ch. 122, §34-83. The Otis School Law unequivocally provides that appointments and promotions of teachers, principals and other educa-

tional employees in cities over 500,000 inhabitants shall be made for merit only. Ill.Rev.Stat. 1977, ch. 122 §34-84. Based upon examinations to determine "character, scholarship and general fitness", the Board of Examiners compiles the eligibility list, ranking candidates according to their relative merit. The statute mandates that,

> ". . . the board of education shall issue gratuitously to those who pass a required test of *character*, scholarship *and general fitness*, such certificates to teach as they are found *entitled* to receive." Ill.Rev.Stat., 1977, ch. 122, §34-83. (emphasis added.)

The purpose intended in the Section 34-84 requirement that appointments be for merit only as determined by the independant Board of Examiners, clearly, was to remove from the Board of Education the unbridled discretion which it had abused by making appointments based upon partisan political consideration. The Illinois Appellate Court so held in *People ex rel. Cook* v. *Board of Education,* 295 Ill. App. 41, 14 N.E.2d 520 (1938), wherein the court stated as follows:

> ". . . it was the intention of the legislature in constituting the Board of Examiners to place the appointment and promotion of teachers in the control of a board that would be influenced alone by the welfare of the schools in the performance of these functions. . . .
>
> The statute indicates, therefore, an intention to vest in educational experts the power and duty of providing the test by which the merits of the candidates shall be determined, and to make the Board of Examiners, insofar as possible, an independant board. Whether the provisions went as far as they should or too far is not for our consideration. *The statute, as a whole, compared with the act it superseded, disclosed an intention to place in the Board of Examiners independant and absolute power in the exercise of which it would not be subservient to any other board. A contrary construction would require us to ignore the manifest intention disclosed* by the substitution of the Board of Examiners for the Board of Education, as in the former statute, *by the omission in this statute (as formerly) to grant to the Board of Education (either expressly or by implication) the power to determine the character and fitness of applicants* and the intention clearly manifested in the whole Act that appointments and promotions of teachers in the public schools of Chicago should be made upon merit as determined by an impartial, competent and independant Board of Examiners." 295 Ill. App. at 55, 58 (emphasis added).

Accord, People ex rel. Loughry v. *Board of Education,* 342 Ill. App. 610, 97 N.E.2d 615 (1951).

The potential evils of patronage were recently recognized by this Court in *Elrod* v. *Burns,* 427 U.S. 347 (1976), wherein Justice Brennan stated as follows:

> "Patronage . . . to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.' Illinois State Employees Union v. Lewis, 473 F.2d at 576. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith." 427 U.S. at 357.

Indeed, Justice Powell, in this dissent, suggested that patronage hiring infringes First Amendment rights even more strongly than patronage firings do. 427 U.S. at 380-81, 381 n.4. Furthermore, it is clear that the evils of the

patronage system are not merely the problem of a past era, but a method used to this day by the powerful to perpetuate their power, especially in Cook County, Illinois. *See e.g., Shakman* v. *Democratic Organization of Cook County,* No. 69 C 2145 (N.D. Ill., Sept. 24, 1979).

It is especially important in applying the Otis School Law to this case to examine the interpretation given the statutory scheme for merit appointment by the Board of Education itself from the enactment of the Otis Law in 1917 until 1970. As noted in the *Maiter* case, immediately following enactment of the Otis School Law, the Board of Education interpreted "for merit only" as requiring the appointment of principal candidates in rank order from the Board of Examiners eligibility list.

It should be noted further, that the statute was re-enacted by the Illinois General Assembly without change in relevant language in the 1945 and 1961 revisions of the School Code, while the Board of Education consistently interpreted this provision as requiring rank order appointments of candidates for principalships, and also, subsequent to the decision of the Illinois Appellate Court in *People ex rel. Cook* v. *Board of Education, supra.* The court in the *Maiter* case, relying on the doctrine of contemporaneous construction, interpreted Section 34-84, stating as follows:

> "The statute in the instant case directs the board to appoint principals for merit only. From 1917 to 1970 the board interpreted this provision as requiring rank order appointment. Certainly this interpretation originated from a reliable source, was made immediately following the enactment of the statute, and continued for approximately 53 years. In addition, the legislature re-enacted this provision in 1945 and 1961 while this interpretation was attached

> to it. We conclude, therefore, that section 34-84 of the School Code requires appointment to the position of principal in rank order from the principals' eligibility list." Slip Opinion at p. 6.

Accord, Courtney v. *Board of Education,* 6 Ill. App.3d 424, 286 N.E.2d 25 (1972).

The right to merit appointment, as determined by an impartial board of examiners, granted teachers and principals in the Chicago Public Schools by the Otis School Law was created in an era when similar legislation establishing independant civil service commissions were being introduced throughout the country to eliminate patronage in public employment. Merit appointment had a definite and certain meaning before it was introduced in Illinois. *See e.g., Rogers* v. *Common Council,* 123 N.Y. 173 (1890). Based upon reform sentiments, Illinois accepted merit appointment by creating a civil service commission, an independant body which was to make appointment decisions on the basis of open, public and competitive examinations, free to all candidates. *People ex rel. Akin* v. *Kipley,* 171 Ill. 44, 59, 49 N.E. 229 (1898).

Thus, it is clear that based on the Otis School Law, as interpreted by the Illinois courts, the Illinois General Assembly and the actions of the Board of Education itself, teachers and principals in the Chicago Public Schools have a property right in their certificates and to appointment and promotion based solely upon merit, their character scholarship and general fitness, *as determined by the independant Board of Examiners.* It is equally clear that the Board of Education had no authority to refuse to appoint Douglas Webster to a principalship even if the Board believed him guilty of some criminal conduct. If an event occurred between the time a candidate was found

qualified by the Board of Examiners and the time the candidate was proposed for appointment or promotion which rendered the qualifications of the candidate suspect, the proper course of conduct for the Board of Education would be to refer the candidate back to the Board of Examiners for a re-examination of character and fitness, *with appropriate due process protections afforded* to guarantee that hard-earned rights are not arbitrarily cut off without providing the holder an opportunity to vindicate those rights.

The decision of the Court of Appeals to restore to the Board of Education the unbridled discretion to make or refuse appointments and promotions without accountability, if allowed to stand would negate the express statutory mandate of the Illinois General Assembly, and reverse nearly a century of progress in freeing public employment in general, and specifically, quality in education, from the control of the patronage system.

B. The Decision of the Court of Appeals Was Erroneous.

1. The Court of Appeals Confused the Issue of the Board of Education's Power to Dismiss Probationary Principals with the Issue of the Board's Power Concerning Initial Appointment.

The central premise of the Court of Appeals' decision was that since probationary principals are not entitled to a hearing if dismissed during their probationary period, Douglas Webster certainly could not expect a hearing even before appointment. This analysis makes sense only on the most superficial level. It totally disregards the language of the Illinois School Code and the entire history of School Law in Illinois. The District Court correctly found that under Illinois law a teaching certificate

was valuable property and that the Illinois General Assembly did not intend its value to be taken without due process both within the Chicago Public School system, and throughout the State. 443 F.Supp. at 675.

The Court of Appeals' argument is not even persuasive in the limited context of the dismissal of probationary principals. It is well-established in Illinois law that the Board of Education not not have the power to dismiss probationary principals arbitrarily. *Illinois Education Association* v. *Board of Education,* 62 Ill.2d 127, 340 N.E.2d 7 (1975); *Wesclin Education Association* v. *Board of Education,* 30 Ill. App.3d 67, 331 N.E.2d 335 (1975). As this Court stated in *Keyishian* v. *Board of Regents,* 383 U.S. 589 (1967),

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, no matter how unreasonable, has been uniformly rejected." 383 U.S. at 605-06.

Certainly, the Illinois General Assembly did not intend to permit the Board of Education to appoint a candidate to principal, only to be immediately dismissed. Such a subterfuge to evade the mandate of merit appointment would be patently unreasonable and impermissible. The statute contemplates that the probationary principal be given an opportunity to perform and be evaluated in the new capacity. The Court of Appeals, however, would permit the Board to appoint and summarily dismiss a candidate as a convenient method to remove a candidate from an eligibility list.

It is neither absurd nor unusual in the context of public employment to find an appointee insulated from improper pressures by the creation of an independent body having

absolute control of appointments, limited only by the requirement that its examinations to determine relative merit be job related, yet after appointment, to subject appointees to a probationary period during which performance in the position is measured for purposes of determining whether the appointee will be retained.

2. The Court of Appeals Usurped the Role of the State Courts in Interpreting State Law.

Although put on notice that the *Maiter* case, which was currently pending in the Illinois Appellate Court, would determine the issue of whether candidates had a right to appointment based upon their rank order on the principals' eligibility list, the Court of Appeals refused to delay its decision in this case pending the Illinois Appellate Court decision in *Maiter*.

The Court of Appeals dismissed the *Maiter* and earlier *Courtney* cases out of hand as concerning merely "priority of consideration" for appointment and not the right to appointment. Such a distinction has no basis anywhere in Illinois law. *The reason why candidates have a right to appointment in rank order is because their rank order on the eligibility list represents their relative merit* as determined by the Board of Examiners, and based upon the Otis School Law, appointments in the Chicago Public Schools shall be "for merit only". The phrase "priority of consideration" coined by the Court of Appeals has no meaning in relation to Illinois School Law. It was used in the Court of Appeals' opinion to semantically diminish the due process aspects of the *Maiter* and *Courtney* cases, namely, the protectible right created by qualifying on the Board of Examiners' examinations and attaining a slot on an eligibility list based upon ascertained relative merit.

This Court has repeatedly stated that the federal courts must look to state law to determine the existence of a property right cognizable under the Fourteenth Amendment. *Board of Regents* v. *Roth, supra; Perry* v. *Sindermann, supra;* and *Bishop* v. *Wood, supra.* Where, as here, official action is challenged as violative of the Constitution, and those actions are under consideration in the state court, the demands of Federalism dictate that the federal court should give deference to the state judicial process and await clarification of the relevant state law. This principle is closely related to the doctrine established by this Court in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), wherein it is stated:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." 312 U.S. at 500.

The decision of Justice Stevens in *Illinois State Employees Union* v. *Lewis*, 473 F.2d 561 (7th Cir. 1972) *cert. denied*, 410 U.S. 928 (1973) illustrates this demand of Federalism, stating as follows:

> "The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion and retirement. A federal court has no power to establish any such employment code. . . . .
>
> If, however, a discharge [or refusal to hire or promote] is motivated by considerations of race, reli-

gion, *or punishment of constitutionally protected conduct,* it is well settled that the State's action is subject to federal judicial review." 473 F.2d at 567-68 (emphasis added).

Rather than rewriting the Illinois School Code, the Court of Appeals' emphasis should have focused, as did the District Court's, on the Board of Education's destruction of Douglas Webster's property right as punishment for his having exercised his constitutional right to be free from unreasonable search and seizure in his brief brush with the criminal process.

It was error and wasteful of judicial resources for the Court of Appeals to have refused to defer to the Illinois courts and delay decision of this case pending the decision of the Illinois Appellate Court in the *Maiter* case.

3. The Court of Appeals Improperly Presumed Mr. Webster Guilty of Criminal Conduct.

The Court of Appeals, like the Board of Education, presumed that Mr. Webster was guilty of criminal conduct, even though no trial on the merits of the criminal allegations against him was ever had. Yet the Court of Appeals states:

> "Thus, for example, the fact that stolen property was found in Webster's possession would remain the same whether he was arrested or not. And the probativeness of this fact remains the same regardless of its exclusion from evidence in a criminal proceeding for Fourth Amendment policy reasons." 599 F.2d at 802 n.14.

There is not one shred of credible evidence in the record to indicate that the property seized from Mr. Webster's home was stolen property. The Court of Appeals, like

the Board of Education, has presumed Douglas Webster guilty, and penalized him at least as severely as if he were a convicted felon, because he exercised his constitutional rights. Mr. Webster's criminal attorney prudently presented a motion to suppress illegally seized "evidence" and thereby effectuated the dismissal of the criminal charge brought against Mr. Webster at the earliest possible moment. Indeed for the attorney to have done otherwise would likely have been malpractice. Should Mr. Webster have insisted on a costly and lengthy proceeding so that he could "prove himself innocent?" Such a suggestion brings to mind the fictional nightmares of the literature of Franz Kafka. But had Douglas Webster known the consequential injury to his valuable employment rights, he surely would have refrained from the exercise of his constitutional right to the peremptory termination of the criminal proceedings. It is not the purpose of this petition to discuss at length the presumption of innocence and the mandate against imposing penalties upon the exercise of a constitutional right.[1] It is merely intended to explain how the Board of Education and the Court of Appeals were both led to ignore Mr. Webster's clear entitlement to appointment under state law.

The Board of Education had been compelled to reinstate Mr. Webster and give him the pay which he lost during the pendency of the criminal proceedings through a mandamus action in the state courts. The humiliation of the Board's department of law was evident at the secret sessions of the Board of Education at which the legal repre-

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[1] The Chicago Committee for Civil Rights Under Law has requested and been given permission by Counsel for Petitioner to present an *amicus curiae* brief on the deprivation of Mr. Webster's liberty interest in support of this Petition.

sentative suggested to the Board that Douglas Webster avoided criminal liability on a legal technicality, but that he really was guilty. In this context, it is understandable that the Board felt that Mr. Webster was presumptuous in seeking a principalship as the Board did not even want him employed as a teacher (but lacked the evidence to dismiss him): Understandable, but certainly not excusable, as one member of the Board, now a judge, admonished the Board that their consideration of Mr. Webster's arrest was improper. That an error of this nature should have clouded the judgment of the Court of Appeals, however, and caused the court to refuse to protect Douglas Webster's clear statutory rights is reprehensible.

CONCLUSION

The trial judge, George N. Leighton, was an eminent criminal attorney prior to assuming the duties of the bench. He is widely known to be tough but fair on the bench. After a plenary trial and extensive arguments in this case, he concluded that Douglas Webster had been deprived of a property right created by the laws of the State of Illinois. His opinion succinctly analyzed Mr. Webster's property right, stating, in part, as follows:

> The laws of Illinois do not require a teacher to have a principal's certificate before he or she can teach in a Chicago public school. A principal's certificate represents an investment of time and money; it is earned by the teacher who seeks career advancements and desires the advantage of other employment opportunities within the Chicago public school system. . . . The certificate is valid for a period determined by state law and rules of the Board of Examiners.

> During that period, the certificate cannot be revoked or suspended , except on written notice to the teacher who must be afforded a hearing and a fair opportunity to invoke the rules and understandings promulgated by the Board of Examiners. This right to a hearing is enjoyed by certificate holders in Chicago and throughout the state of Illinois. See Ill.Rev.Stat. 1971, ch. 122, § 21-23; see Annot. 48 L.Ed.2d 996. This right is important because as long as the teacher holds the certificate, he or she has the benefit of being listed on the principals eligibility list from which selections will be made of those to be promoted to principalships in the Chicago public schools as vacancies occur. This entitlement is a valuable right; it is the only means by which the teacher may recover the investment in time and money represented by the certificate.
>
> . . . The right to follow a chosen profession free from unreasonable governmental interference is property under the federal constitution. *See, e.g., United States* v. *Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967); *Greene* v. *McElroy,* 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Friendship Medical Center, Ltd.* v. *Chicago Board of Health,* 367 F.Supp. 594, 603 (N.D. Ill. 1973).
>
> . . . In the judgment of this court, Illinois state law, the rules and the mutually explicit understandings between teachers and the Board of Examiners concerning claims of entitlement under a principal's certificate, make the certificate issued to Webster "property" as that term is used is Illinois law. *Father Basil's Lodge* v. *City of Chicago,* 393 Ill. 246, 65 N.E.2d 805 (1946); *compare Young* v. *Brashears,* 560 F.2d 1337 (7th Cir. 1977). 443 F.Supp. at 675-76.

On the contrary, the opinion of the Court of Appeals is flawed by confusion of issues and serious errors in logic. The Court of Appeals accepted Judge Leighton's Findings of Fact, but ignored their clear meaning. It is

extremely unfortunate that the Court of Appeals chose not to defer to the Illinois Appellate Court and await the decision in the *Maiter* case. Had the court done so, it is quite likely that it would have decided other than it did, rendering this Petition unnecessary. Nonetheless, the Court of Appeals did proceed erroneously, ignoring the history of Illinois School Law, and indeed, the entire history of merit appointment in public employment, and the existing Illinois case law which is unequivocal in holding that the Board of Examiners and not the Board of Education is the sole body with authority to determine the qualifications of candidates for appointment. Despite Douglas Webster's substantial investment in time, money and effort, despite his proven scholarship and commitment to self-improvement and despite his record of excellence as a teacher established over more than two decades of service to the Chicago Public Schools and its students, the Court of Appeals found that Douglas Webster had no greater rights than did the first-year instructor in the *Roth* case. If the Court of Appeals' decision is allowed to stand, a monumental injustice will have been done.

Petitioner respectfully requests that this Honorable Court reverse the decision of the Court of Appeals and affirm the decision of the District Court, and further, that Petitioner be awarded his costs and attorneys' fees in the Court of Appeals and in this Court.

Respectfully submitted,

GORDON V. LEVINE,
Counsel for the Petitioner.

APPENDIX

Douglas Warren WEBSTER, Plaintiff,

v.

James F. REDMOND et al., Defendants.

No. 72 C 3005.

United States District Court,
N. D. Illinois, E. D.

Dec. 23, 1977.

Memorandum

LEIGHTON, District Judge.

This litigation is the result of a dispute between a teacher, the Chicago Board of Education, its members, and certain of its executive employees, concerning the teacher's rights, as holder of a principal's certificate, to be the principal of a Chicago elementary school. Trial has been without a jury on a multi-count amended complaint which alleged that in connection with a vacant principalship defendants subjected the teacher to race discrimination, an unlawful employment practice, and deprivation of due process of law.

The teacher's claims are asserted under Title 42 U.S.C. §§ 1981, 1983, 2000e-3, and 2000e-5. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1343(4). The teacher seeks declaratory relief as provided in 28 U.S.C. §§ 2201 and 2202. He alleges that the matter in controversy exceeds the sum or value of $10,000, exclusive of costs and interest and arises under the constitution and laws of the United States.

After hearing evidence consisting of the testimony of witnesses, excerpts from depositions, and exhibits offered and received for the parties, this court at various stages

of the trial ruled in favor of defendants on the claims of race discrimination and unlawful employment practice. Findings of fact were made; conclusions of law reached; and judgments were entered, for defendants, on these claims. Having done so, the court decided that the only remaining question in this case is whether the teacher was denied due process of law when a vote of the Board deprived him of a school principalship, he being otherwise qualified, solely for the reason that once he was arrested and indicted for a felony, being the receiver of stolen property; but the indictment was dismissed because on his motion, it was determined that evidence the state was going to use against him was taken from his home by an unreasonable search and seizure. This question, and the issue it presents, arise from the following facts.

I.

Douglas Warren Webster is a black American; and with the exception of a tour of duty with the United States Army from 1953 to 1955, he has been a lifelong resident of the city of Chicago. Since 1953, when he was graduated from DePaul University with a degree of bachelor of arts in education, he has been a Chicago elementary school teacher. He has a master of arts degree from the same university; and, continuing his education, has accumulated in excess of 36 hours beyond the master's degree level at various institutions of higher learning in the Chicago area. He has worked toward becoming qualified for the position of school principal. Toward this end, he studied for, took all the examinations, passed them, and was granted a principal's certificate dated August 25, 1970. At the time of the trial of this case, Webster was on the principal's eligibility list of the Chicago Board of Education; and was, as he had always been qualified to be a school principal. Throughout his career in the Chicago school system, he has enjoyed a superior rating for the way he has performed his duties of a teacher, master teacher, assistant principal, and acting principal.

On January 21, 1971, while he was assigned to the Cook County Jail school maintained by the Board of Education, Webster was arrested and later indicted for the felony of being the receiver of stolen property, a ring worth more than $100 that had been taken in an armed robbery. This arrest, and later the charge, came to the attention of his superiors; and as a result, Webster was suspended from his duties as a Chicago school teacher. He employed a lawyer; and on March 5, 1971, filed a motion to suppress the evidence against him on the ground that it had been taken from his home by an unconstitutional search. The motion was heard; and a judge ruled that the evidence the state was going to use against Webster had been taken from his home by an unreasonable search and seizure in violation of his constitutional rights. The evidence was suppressed; and a short time later the indictment against Webster was stricken with leave to reinstate. No appeal was taken, although the ruling was reviewable under Illinois law.

In the meantime, Webster remained suspended from his duties as a school teacher. No charges were filed against him. Finally, on August 11, 1971, the General Superintendent recommended to the Board that Webster be reinstated to his position with back pay from January 26, 1971, when he was suspended, to September 3, 1971, when he was to be reinstated. This was done; and Webster resumed his duties.

At about the same time, steps were being taken by which, consistent with Board guidelines, a vacancy in the principalship of the Delano Elementary School was going to be filled. Three qualified persons from the Board's principals eligibility list were interviewed by the Local Advisory Council. Webster's name was selected as the person to be recommended to the General Superintendent, and by him to the Board, as qualified to fill the vacancy. Therefore, on January 14, 1972, at an executive session of the Board, Webster's name was before it for a vote by which he was to be promoted from teacher to principal

of the Delano School. After the name was proposed, and the information from Webster's career as a teacher was distributed to the Board, a deputy superintendent reviewed the arrest of January 21, 1971 and the charge that followed. The attorney for the Board completed the review with references to the motion to suppress, how the court ruled on it, and the dismissal of the indictment. Despite these facts, the Associate Superintendent in whose area the Delano School was located reiterated his desire to have Webster as a principal because of his superior rating as a teacher. The Superintendent and his entire staff supported Webster's promotion. However, in the discussion, two members objected to the Board promoting to a school principalship a teacher who had once been arrested and charged with a felony. The observation was made by one board member that although Webster had not been convicted of the charge, the indictment against him was dismissed "on a technicality"; that is, the case was not prosecuted because evidence illegally seized from his home was suppressed.

A vote was taken; four members were recorded as being for Webster's promotion to the school principalship; six against; one passed.[1] Thus, although his qualifications to be a school principal were not otherwise questioned, Webster was denied the promotion only because he was once arrested, indicted for a felony, but never convicted. Following this vote, and one taken on April 26, 1972 that adhered to it, Webster was never again considered for a school principalship, although he was recommended for the position, and he has always held the certificate by which the Board of Examiners declared, and the Board of Education has recognized, that he is qualified for such

[1] Between January 14 and April 26, 1972 when the Board next met, one member who had voted against Webster's promotion changed her mind. This , however, did not affect the outcome because her motion at the April meeting, one that would have led to the Board giving further consideration to Webster's promotion was not adopted.

a position. On numerous occasions, various members of local advisory councils sought to learn why Webster was not made the principal of their schools; but Board members, and members of the Board's administrative staff, responded by saying that he would never be made a principal; that they were not at liberty to give the reasons; that Webster "was involved in a legal matter"; and that, in any event, the reasons were personal.[2]

II.

Based on these facts, Webster contends that his principal's certificate was a valuable property right and an interest in liberty reflected in the opportunity he had earned to a promotion from teacher to principal in the Chicago public school system; that the due process clause of the Fourteenth Amendment guaranteed him some form of notice and hearing before he could be deprived of that property and liberty; that the same constitutional amendment, and the law and public policy of the state of Illinois, prohibited members of the Chicago Board of Education from denying him a principalship only because of an arrest, indictment and criminal prosecution that ended in a dismissal of the charge.

In support of these contentions, Webster argues that under Illinois law, appointments and promotions of teachers and principals are based only on merit. Once the Board of Examiners issues a principal's certificate and determines the merit qualifications of a teacher to be a principal, as it did in his case, the Board of Education has no authority to redetermine the merit of such a teacher for promotion. Webster points to the Illinois School Code, Ill.Rev.Stat.1971 ch. 122, § 21-1, which regulates the registration of teacher certificates, and provides

[2] On November 22, 1974, in accordance with an Illinois statute, the record of Webster's arrest and indictment was expunged. This fact, however, was never brought to the Board's attention since the General Superintendent, relying on the Board's previous votes, has never recommended Webster for promotion.

that "[i]n determining good character under this section, any felony conviction of the applicant may be taken into consideration, but such a conviction shall not operate as a bar to registration." Thus, he insists that the votes of the Board of Education barring him from promotion to a school principalship, only because of an arrest and indictment for a felony, were arbitrary state action that deprived him of due process of law in violation of the Fourteenth Amendment to the constitution of the United States.

The Board members who remain defendants in this case[3] contend that Webster's principal's certificate represented neither a property right nor a liberty interest that was protected by the due process clause of the Fourteenth Amendment. Illinois law, they argue, vests them with broad discretion in the appointment and promotion of teachers and principals, a discretion that goes to the heart of Webster's contention that under state law he had a property right or liberty interest in the principal's certificate issued to him by the Board of Examiners. They insist that the decisions of Illinois reviewing courts reveal Webster had no right or interest that was adversely affected by the Board's vote when on January 14, 1972 he was denied a promotion from a teacher to a principal. The Board members argue that decisions of the court of appeals of this circuit, and of the Supreme Court of the United States, show that Webster had no liberty interest that was infringed by his being denied a school principalship. Therefore, these Board members conclude that on these facts, Webster was not denied procedural due procees

[3] In its earlier rulings, at the close of plaintiff's case in chief and at the close of all the evidence, this court entered judgments in favor of all defendants and dismissed the suit as to members of the Chicago Board of Education who were not in office on January 14, 1972. Therefore, this suit under 42 U.S.C. § 1983 proceeds only against those who were members of the Board when Webster was denied the principalship.

nor equal protection of the laws by any action taken by the Board of Education on January 14, 1972 with regard to his promotion from a teacher to the principal of a Chicago public school.

III.

A property interest in employment can be created by an ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. *Bishop* v. *Wood,* 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). For due process purposes, a person's interest in a benefit is "property" if there are rules or mutually explicit understandings that so support his claim of entitlement that he can invoke such rules and understandings in a hearing. *Perry* v. *Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Liberty, the concept on which Webster relies, recognizes two interests of a public employee: first, protection of the employee's good name, reputation, honor and integrity; second, his or her freedom to take advantage of other employment opportunities. *Lipp* v. *Board of Education of City of Chicago,* 470 F.2d 802, 805 (7th Cir. 1972). Generally, it is said that property interests are not created by constitutions, state or federal. Rather, they are created and their dimensions defined by rules and understandings that stem from state law; rules or understandings that secure benefits and support claims to their entitlement. *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The laws of Illinois do not require a teacher to have a principal's certificate before he or she can teach in a Chicago public school. A principal's certificate represents an investment of time and money; it is earned by the teacher who seeks career advancements and desires the advantage of other employment opportunities within the Chicago public school system. It is awarded only to the teacher who, consistent with the rules of the Board of Examiners, holds an advanced degree from a recognized institution of higher learning, and who has successfully

passed approved programs of academic and professional preparation. To obtain such a certificate, the successful teacher must pass an examination consisting of two parts, one written and the other oral. *People ex rel. Loughry* v. *Board of Educatiion of the City of Chicago,* 342 Ill.App. 610, 97 N.E.2d 615 (1951); *compare People ex rel. Cook* v. *Board of Education of the City of Chicago,* 295 Ill.App. 41, 14 N.E.2d 520 (1938); I.L.P. Schools § 242. The certificate is valid for a period determined by state law and rules of the Board of Examiners. During that period, the certificate cannot be revoked or suspended, except on written notice to the teacher who must be afforded a hearing and a fair opportunity to invoke the rules and understandings promulgated by the Board of Examiners. This right to a hearing is enjoyed by certificate holders in Chicago and throughout the state of Illinois. See Ill.Rev. Stat.1971, ch. 122, § 21-23; see Annot. 48 L.Ed.2d 996. This right is important because as long as the teacher holds the certificate, he or she has the benefit of being listed on the principals eligibility list from which selections will be made of those to be promoted to principalships in the Chicago public schools as vacancies occur. This entitlement is a valuable right; it is the only means by which the teacher may recover the investment in time and money represented by the certificate. Chicago public school principals are paid more than are school teachers. Thus, by earning a principal's certificate through investment of time and money, acquisition of additional academic qualifications, by taking and passing requisite examinations, a teacher like Webster pursues his chosen profession and exercises freedom in taking advantage of other employment opportunities within the system that employs him. *See Board of Regents* v. *Roth,* 408 U.S. 564, 573-74, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The right to follow a chosen profession free from unreasonable governmental interference is porperty under the federal constitution. *See, e. g., United States* v. *Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); *Greene* v. *McElroy,* 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377

(1959); *Friendship Medical Center, Ltd.* v. *Chicago Board of Health,* 367 F.Supp. 594, 603 (N.D. Ill.1973). In Illinois, state law recognizes that the term "property" includes every interest one may have in any and everything that is the subject of ownership by man; it is a word of general import which applies to every specie of right and interest capable of being enjoyed as such and on which it is practicable to base a money value. *Metropolitan Trust Co.* v. *Jones,* 384 Ill. 248, 51 N.E.2d 256 (1943); *compare Citizens Utilities Company of Illinois* v. *Metropolitan Sanitary District,* 25 Ill.App.3d 252, 322 N.E.2d 857 (1974).

In the judgment of this court, Illinois state law, the rules and the mutually explicit understandings between teachers and the Board of Examiners concerning claims of entitlement under a principal's certificate, make the certificate issued to Webster "property" as that term is used in Illinois law. *Father Basil's Lodge* v. *City f Chicago,* 393 Ill. 246, 65 N.E.2d 805 (1946); *compare Young* v. *Brashears,* 560 F.2d 1337 (7th Cir. 1977). That certificate is also protected by the concept of liberty. In a society such as ours, liberty is a broadly defined term. *Miller* v. *School District No. 167, Cook County, Ill.,* 354 F.Supp. 922, 925 (N.D.Ill.1973). "[I]t denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *State of Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923).

Notwithstanding these principles, the board members argue that Webster's liberty interest was not adversely affected by them or their agents when they denied him a principalship because his good name, reputation, honor and integrity were zealously protected by their policy of never revealing to the public the reasons for the non-

appointment of a teacher to a principalship. However, this court has found that after Webster was denied the promotion, and until sometime in September 1973, members of the Board's administrative staff, and Board members, told persons from various community councils who inquired that Webster would never be appointed to the position of a school principal; that they were not at liberty to tell why; that he was involved in a legal matter; and that, in any event, the reasons for his not being promoted were personal.

It would be naive to conclude that this kind of information, distributed as it was throughout the community, did not injure Webster's good name, honor, and integrity as a teacher. Moreover, it is clear from the Board's actions, that Webster's liberty was adversely affected. The "freedom to take advantage of other employment opportunities" to which the court referred in *Lipp* v. *Board of Education of City of Chicago*, 470 F.2d 802, 805 (7th Cir. 1972), does not mean for Webster the seeking of employment outside the Chicago school system. In the context of this case, the concept of liberty means for Webster freedom from arbitrary governmental interference so he can go as far in the hierarchy of the school system as his ability will allow him. However, only because he was once arrested, indicted for a felony but never convicted, he has been effectively barred from being what he wants to be, a school principal. It is clear, therefore, that his liberty interests were strongly implicated. *See Austin* v. *Board of Education of Georgetown, Etc.*, 562 F.2d 446 (7th Cir. 1977).

More important to this case, however, is the fact that on January 14, 1972 when his name was presented to the Board for promotion, Webster had every reason to expect appointment to the position for which he had been recommended. He had been selected by the local advisory council. He was recommended by the General Superintendent and the Deputy Superintendent. He had the approval of the responsible Associate Superintendent. He had the

support of the Board's administrative staff. All of these responsible Board subordinates knew of the arrest and indictment. No one claimed he lacked the qualifications for the principalship. No one said that his brief brush with crime in any way impaired his ability to be a good Chicago principal. Under these circumstances, the Board's action in denying Webster the promotion infringed the right he had under Illinois law that "[e]very person is presumed innocent until proven guilty." *People* v. *Weinstein,* 35 Ill. 2d 467, 220 N.E.2d 432 (1966); *People* v. *Johnson,* 4 Ill. App.3d 539, 281 N.E.2d 451 (1972); Ill.Rev.Stat.1971, ch. 38, § 3-1. The Board's vote was arbitrary state action that effectively took from Webster all the benefits and entitlements he had earned when he qualified for his principal's certificate.

The touchstone of due process of law is protection of the individual from arbitrary action of the government. *Dent* v. *West Virginia,* 129 U.S. 114, 123-24, 9 S.Ct. 231, 32 L.Ed. 623 (1889). It would have been arbitrary and unreasonable for the State of Illinois to have adopted a statute which, for school principalships, had an across the board disqualification as to all teachers who had felony convictions. See *Smith* v. *Fussenich,* 440 F.Supp. 1077 (D.Conn.1977). In fact, the Illinois legislature has declared that in determining the good character of those who teach, or as principals, supervise in the public schools of the state, "any felony conviction of the applicant may be taken into consideration, but such a conviction shall not operate as a bar to registration [of a certificate]." Ill. Rev.Stat.1975, ch. 122, § 21-1. Therefore, this court concludes that when by their vote, members of the Chicago Board of Education denied Webster a school principalship only because he was once arrested and indicted for a felony but not convicted, they deprived him of his property and liberty in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

IV.

This being the case, judgment will be entered in Webster's favor on the issue this court has resolved. The question remaining, then, is what relief should be granted that will remedy the wrong committed when his civil rights were violated. This is a suit brought under 42 U.S.C. § 1983, a federal statute under which Webster could sue for the invasion to his rights that has occurred. See Comment, Developments in the Law: Section 1983 and Federalism, 90 Harv.L.Rev. 1133 (1977). In such instances, a federal court has the power to use any available remedy that will make good the wrong done. *Bell* v. *Hood,* 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *Donahue* v. *Staunton,* 471 F.2d 475 (7th Cir. 1972), *cert. denied,* 410 U.S. 955, 93 S.Ct. 1419, 35 L.Ed.2d 687 (1973). And in such cases, a district judge has broad equitable discretion in fashioning a remedy. *Decker* v. *North Idaho College,* 552 F.2d 872, 874 (9th Cir. 1977). Accordingly, this court rules that Webster shall have the following relief.

First, as compensatory damages the remaining defendant Board members shall pay him a sum that would place him, so far as money can do it, in the position in which he would have been if they had promoted him to a school principalship on January 14, 1972. *Lee* v. *Southern Home Sites Corporation,* 429 F.2d 290, 293 (5th Cir. 1970). This amount is to be calculated in a manner that will take into account the salary of a principal like the one at the Delano Elementary School from January 14, 1972 to the date of the judgment in this case, less Webster's earnings as a teacher. *Compare McBeth* v. *Board of Education of DeVall's Bluff School District No. 1, Arkansas,* 300 F. Supp. 1270 (E.D.Ark.1969).

Second, the defendant Board members will be ordered to appoint Webster, immediately, to an elementary school principalship, retroactive to January 14, 1972. This is an appropriate remedy in a case like this one. *Compare Burton* v. *Cascade School District Union High School, No. 5,*

512 F.2d 850 (9th Cir.), *cert. denied,* 423 U.S. 839, 96 S.Ct. 69, 46 L.Ed.2d 59 (1975); *Cooley* v. *Board of Education of Forest City School District,* 453 F.2d 282 (8th Cir. 1972).

Third, in the event the Board members will not or cannot promote Webster to a school principalship, then he is entitled to be paid, as compensatory damages, an amount of money, calculated on his life expectancy, which he would earn during the period of his working life, had he been made the principal of the Delano Elementary School on January 14, 1972. *See Connell* v. *Higginbotham,* 305 F.Supp. 445 (M.D.Fla. 1969), *aff'd in part, rev'd in part on other grounds,* 403 U.S. 207, 91 S.Ct. 1772, 29 L.Ed.2d 418 (1971); *compare Hegler* v. *Board of Education of Bearden School District, Bearden, Arkansas,* 447 F.2d 1078 (8th Cir. 1971).

Fourth, as further compensatory damages, Webster is entitled to be paid an amount of money for the invasion of his liberty interests which occurred when he was denied the principalship on January 14, 1972. For a school teacher, promotion to a principalship is professional achievement; it is the realization of freedom of upward movement in the hierarchy of employment opportunities within the school system that employs him. The money amount of this element of compensatory damages will be determined by the court when the judgment in favor of Webster is entered.

Fifth, Webster is entitled to recover from defendant Board members an amount for the payment of reasonable attorneys fees, and reimbursement of his expenses in this litigation. Section 2 of Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988, applies to this case, although it was pending when that statute was adopted. An award of attorneys fees under this new statute is proper unless such relief will result in manifest injustice, or there is a statutory direction or legislative history to the contrary. *Bond v. Stanton,* 555 F.2d 172 (7th Cir. 1977). This is true even though the legal

services in question were rendered prior to the effective date of the amendatory act. *Gary W.* v. *State of Louisiana,* 429 F.Supp. 711 (E.D.La.1977). It is true in this case that the Board members involved did not act with malice when they violated Webster's civil rights; but their prelitigation obduracy, and their obstinate defense to his claims, made this protracted suit necessary. The general scheme for relief which this court has fashioned in its discretion would be defeated if out of what he recovers Webster is compelled to pay his attorneys fees and expenses of this litigation. In determining this element of the relief to be granted, one of the considerations must be "the relative financial positions of the parties at the time of the constitutional violation, which in the case at bar weighs in favor of allowing attorneys fees . . . ." *Donahue v. Staunton, supra* at 483. Also, this court observes that a case like this one benefits all certificate holding teachers in the Chicago public schools.

Therefore, for all of these reasons, an appropriate judgment order, consistent with the views expressed in this memorandum, and complying with the requirements of Rule 58, Fed.R.Civ.P., may be tendered to the court for approval and entry.

So ordered.

DOUGLAS WARREN WEBSTER,
Plaintiff-Appellee, Cross-Appellant,

v.

JAMES F. REDMOND el al.,
Defendants-Appellants, Cross-Appellees.

Nos. 78-1978, 78-2032

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 23, 1979.

Decided May 22, 1979.

Rehearing and Rehearing En Banc
Denied June 19, 1979.

Before SWYGERT and SPRECHER, Circuit Judges, and NOLAND, District Judge.[1]

SWYGERT, Circuit Judge.

This appeal concerns an alleged employment discrimination. The plaintiff, a black schoolteacher in the Chicago public school system, claims that he was the victim of such discrimination at the hands of the Chicago Board of Education.

The threshold issue is whether the Board of Education deprived the plaintiff of a protectable liberty or property interest when it refused to promote him to to the position of principal. The district court found that the plaintiff had been deprived of both a liberty and a property interest without due process of law. Because we find no protectable interest to be implicated in this case, we reverse. On the other hand, we affirm the district court's entry of judgment for the defendants as to plaintiff's claims based on racial discrimination in employment.

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[1] The Honorable James E. Noland, United States District Judge for the Southern District of Indiana, sitting by designation.

Douglas Warren Webster is curently a public schoolteacher employed by the City of Chicago, and except for a brief period of suspension, he has been so employed since 1953. In August of 1970 Webster received a principal's certificate, having taken and passed the examination established by the Board of Examiners for the Board of Education of the City of Chicago.

In January 1971, while he was a teacher in a school maintained by the Board of Education at the Cook County Jail, Webster was arrested and later indicted for the felony of being the receiver of stolen property. As a result of his arrest, Webster was suspended from his teaching duties by the General Superintendent of Schools.

On March 5, 1971 Webster's attorney moved the state trial court to suppress evidence seized at the time of his arrest, alleging that the search of his apartment conducted at the time had been conducted in violation of his constitutional rights. The court sustained the motion and later ordered that the indictment of Webster be stricken.[2]

Webster then demanded reinstatement of his teaching position, and in May of 1971 he instituted a mandamus action in state court to this end. That action was compromised by the parties on the basis of plaintiff's reinstatement to a teaching position with backpay. Webster was subsequently reinstated, but was transferred from the Cook County Jail program to a teaching position at Whittier School in Chicago.

In the fall of 1971 Webster was recommended by a local principal nominating committee for the principalship of Delano Elementary School. This nomination was processed through the proper channels and resulted in the recommendation of Webster by the General Superintendent to the Board of Education. The Board met in

[2] On November 22, 1974 the record of Webster's arrest and indictment was expunged from the public records in accordance with Illinois law.

executive session on January 14, 1972 to consider the promotion.

After Webster's name had been proposed and the information concerning his career as a teacher had been distributed to the Board, a deputy superintendent reviewed for the Board the arrest and indictment. The Board's attorney supplemented these remarks regarding the circumstances involved and informed the Board of the granting of the suppression motion and the striking of the indictment. The Board then voted against the promotion by a vote of six to four, with one abstention.[3]

In keeping with the Board's policy, no public disclosure was made regarding the failure to approve the promotion. When representatives of the Delano School sought information, they were told that the Board knew facts which they did not. When Webster met with the deputy Superintendent on January 19, 1972, he was not told the reasons for the Board's failure to approve his promotion.

Following the January disapproval, Webster was nominated by the local principal nominating committee of the Doolittle East Elementary School. During an executive session of the Board on April 26, 1972, the General Superintendent sought the consensus of the Board regarding this nomination. The Board voted down a motion to give consideration to Webster's promotion to the rank of principal without prejudice. Perceiving that there was not "a reasonable likelihood of appointment by the Board," the General Superintendent did not recommend Webster for promotion to the Doolittle East principalship.

[3] The district court, apparently relying on the informal minutes of the meeting made by the General Superintendent's administrative assistant, found the vote to be as listed above. One Board member listed as in favor of the promotion, Warren Bacon, testified that he in fact voted against it. The results of the vote were never officially recorded, since the General Superintendent withdrew his recommendation after the unfavorable vote.

After the April meeting, members of the Doolittle East committee made numerous attempts to ascertain the reasons behind the failure to promote Webster. In November 1972 a member of the Board gave committee members her opinion that Webster would not be promoted to the principalship of any school, but she declined to state the reasons for her view.

On November 29, 1972 Webster instituted this action, which was tried to the court without a jury. The case against certain defendants, primarily those who had been appointed to the Board after the April 26, 1972 meeting, was dismissed at the close of plaintiff's case. Plaintiff's claims of racial discrimination were dismissed as to all defendants at the close of the evidence. Judgment against the plaintiff was entered in favor of three defendants who had voted for Webster's promotion at the January 14, 1972 meeting of the Board. Judgment for the plaintiff and against the remaining defendants was entered on the grounds that they had deprived Webster of his property and liberty in violation of the Due Process Clause of the Fourteenth Amendment. These defendants filed an appeal in this court, and plaintiff cross-appealed from the dismissal of his racial discrimination claims.

II

The determining issue in the main appeal is whether liberty or property interests sufficient to invoke the protection of the Fourteenth Amendment have been implicated. "The requirements of procedural due process apply only to the deprivation of interests encompased by the Fourteenth Amendment's protection of liberty and property . . . [and] the range of interests protected by procedural due process is not infinite." *Board of Regents* v. *Roth,* 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). "[T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake." *Id.* at 570-71, 92 S.Ct. at 2705-2706 (emphasis in original).

[1, 2] Before making that determination, it is important to define the relatively narrow scope of the inquiry. At this stage of the analysis, the reasons for the Board's decision are irrelevant. If no protectable liberty or property interest is found to be implicated, no process is "due" and no reasons or hearing need be given. Certainly this is true to the extent that the reasons have not been made public, although public explanations may affect liberty interests.[4] With these limitations in mind, we begin by inquiring into whether any constitutionally protectable interests are involved. We must determine (1) whether the Board's decision not to promote Webster affected his protectable interest in liberty, and (2) whether Webster had a property interest in obtaining the promotion to the principalship in question.

The inquiry begins with a review of recent Supreme Court cases which have dealt with this issue. In *Board of Regents v. Roth, supra,* a teacher hired for a fixed term of one academic year was told without explanation that he would not be rehired. In evaluating the implication of liberty interests, the Supreme Court noted that all it had before it was the fact that the teacher was not rehired. On this basis, the Court did not find a constitutionally protectable liberty interest, at least where the person remained free to seek jobs other than the one for which he was not rehired. 408 U.S. at 575, 92 S.Ct. 2701.

The Court also noted in *Roth* that certain factors were not present:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so,

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[4] Note also that in this inquiry focusing on procedural due process, we are not concerned with the presence of impermissible discriminatory reasons, such as race.

> this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 [91 S.Ct. 507, 510, 27 L.Ed.2d 515] . . . . In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case.

Id. at 573-74, 92 S.Ct. at 2707 (footnote and citations omitted).

Two more recent Supreme Court cases serve to clarify the *Roth* holding. In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Court was required to evaluate the liberty or property interests at stake in a suit brought by a person whose photograph and name were included in a circulated list of "active shoplifters" after he had been arrested on a shoplifting charge which was later dismissed. The list was distributed by the police in the form of a flyer to area merchants. Davis complained that even though his current employer had not dismissed him, his future employment opportunities would be seriously impaired. The Court held that Davis' interest in reputation was of a type which, although protectable by state tort law, did not amount to either liberty or property in Fourteenth Amendment terms. The "defamation" perpetrated by the police through the flyer did not work any change in Davis' status as theretofore

recognized under state law. 424 U.S. at 712, 96 S.Ct. 1155.[5] The Court also noted that apart from the procedural guarantees of the Due Process Clause, no substantive limitation upon state action encompassed within the "liberty" term of the Fourteenth Amendment had been violated. Davis' claim that the state may not publicize the record of an official act such as an arrest was held to be without merit. *Id.* at 712-13, 96 S.Ct. 1155.

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), involved the firing of a policeman without a hearing, although the reasons for the dismissal were not made public, the officer was told privately that he had been dismissed because of failure to follow orders and other conduct unsuited to an officer. These reasons were reiterated during pre-trial discovery. The Court held first that the officer had no protectable property interest. It then held that, even assuming that the explanation for the officer's discharge was completely false, he had not been deprived of a protectable liberty interest. "The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired." 426 U.S. at 349, 96 S.Ct. at 2079-80 (footnote omitted). "The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 350, 96 S.Ct. at 2080. As to the officer's contention that the reasons given for the discharge were so serious as to constitute a stigma that might severely damage his reputation, the Court held that no valid claim had been stated. The privately com-

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[5] The Court commented on *Roth*:

> Certainly there is no suggestion in *Roth* to indicate that a hearing would be required each time the State in its capacity as employer might be considered responsible for statement defaming an employee who continues to be an employee.

424 U.S. at 710, 96 S.Ct. at 1165.

municated reasons could not form the basis of a claim, and neither could the reiteration of those reasons in the course of a judicial proceeding commenced after the alleged injury had been suffered. *Id.* at 348, 96 S.Ct. 2074.

Reviewing the facts of the case at bar in light of the foregoing decisions leads to the conclusion that the Board's actions did not impair any of Webster's liberty interests protected under the Fourteenth Amendment. He remains free to seek public employment in positions other than the ones to which he was not promoted. *Cf. Roth, supra,* 408 U.S. at 573-75, 92 S.Ct. 2701. Indeed, he has remained in the employ of the Board. *See Paul v. Davis, supra,* 424 U.S. at 710, 96 S.Ct. 1155. The reasons for his failure to be promoted were not made public by the Board prior to this judicial proceeding, *see Bishop v. Wood, supra,* 426 U.S. at 348, 96 S.Ct. 2074, and any publication of the official fact of his failure to be promoted is without merit as the basis for a due process claim. *See Paul v. Davis, supra,* 424 U.S. at 712-13, 96 S.Ct. 1155.

The fact most favorable to Webster's claimed deprivation of a protectable liberty interest is the Board's vote relating to his second nomination. The Board's refusal to consider that nomination without prejudice was not, however, equivalent to a regulation barring Webster from all other public employment. *Cf. Roth, supra,* 408 U.S. at 573, 92 S.Ct. 2701. Indeed it did not even bar him from continued employment with the Board, let alone from the rest of the public educational system. It amounted to a statement that the Board would not at that time reconsider its previous decision not to promote Webster to the rank of principal. The second vote itself thus did not further implicate any liberty interests.

As to a stigma attaching as a result of this second vote, no reasons for the vote were ever published prior to this litigation. The mere fact of nonpromotion does not itself implicate a protectable liberty interest, *see Roth, supra,* and because neither the Board nor any of

its members published reasons for the decision, it cannot be said that the Board made "[a] charge against him that might seriously damage his standing and associations in his community." *Id.* 408 U.S. at 573, 92 S. Ct. at 2707.[6]

Given the predicate that Webster failed to prove the deprivation of a constitutionally protected liberty interest, we must next inquire whether he had a protectable interest in property which was impaired or destroyed by the Board's actions. The Supreme Court noted in *Roth*:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577, 92 S.Ct. at 2709.

As has been made clear in subsequent decisions of the Supreme Court,[7] the key proprietary ingredient

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[6] His arrest and indictment were at the time matters of public record for the publicity of which the Board was not responsible. And, moreover, publication of an official act such as an arrest does not itself give rise to a meritorious due process claim. *Paul* v. *Davis,* 424 U.S. at 712-13, 96 S.Ct. at 1165-66. As to the published personal opinion of one Board member that Webster would never get the promotion, this unofficial statement does not amount to an official, published position of the Board. At any rate, even if this were construed as damaging to his reputation, no hearing "would be required each time the [Board] in its capacity as employer might be considered responsible for a statement defaming an employee who continues to be an employee." *Id.* at 710, 96 S.Ct. at 1165.

[7] *See Bishop* v. *Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Perry* v. *Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

is "entitlement." Thus, the issue is whether possession of a principal's certificate itself entitles Webster under state law to an appointment as a principal whenever an opportunity for such an appointment is created.[8]

The Illinois School Code, Ill.Ann.Stat. ch. 122, §§ 1 *et seq.* (Smith-Hurd), contains a variety of provisions pertaining to the appointment of principals.[9] Section 34-8 provides:

> Appointments, promotions and transfers of teachers, principals, assistant and district superintendents and all other employees in the teaching force shall be made . . . by the board only upon the recommendation of the general superintendent of schools or by a majority vote of the full membership of the board.

Section 34-84 contains the following provisions:

> Appointments and promotions of teachers, principals and other educational employees shall be made for merit only, and after satisfactory service for a probationary period of 3 years (during which period the board may dismiss or discharge any such probationary employee upon the recommendation, accompanied by the written reasons therefor, of the general superintendent of schools) appointments of teachers and principals shall become permanent, subject to: (1) termination by compulsory retirement at the age of 65 years; (2) the rules of the board concerning

[8] Webster's right to possess the certificate is not at issue. As the district court found:

> Plaintiff still holds this certificate and is on the principals' eligibility list maintained by the Board of Education. His certificate has never been questioned; and his right to hold that certificate has not been adversely affected by any action or ruling of the Board of Education, or any of its subsidiary agencies.

[9] The relevant provisions are those of section 34, which apply only to cities having a population exceeding 500,000. Ill.Ann.Stat. ch. 122, § 34—1 (Smith-Hurd).

> conduct and efficiency; and (3) removal for cause in the manner provided by Section 34-85.

Section 34-85 deals with post-probationary removal:

> No teacher or principal appointed by the board of education shall (after serving the probationary period of 3 years specified in Section 24-84) be removed except for cause, and then only by a vote of a majority of all members of the board, upon written charges presented by the general superintendent of schools, to be heard by the board or a duly authorized committee thereof.[10]

A reading of these statutory provisions highlights certain key aspects of the issue. The probationary period for newly appointed or promoted teachers and principals is three years. After the probationary period has expired, dismissal may only be for cause, and a hearing is required. During the probationary period after promotion, however, there is neither a requirement that the dismissal be for cause nor a requirement for a hearing. All that is required for dismissal during probation is a recommendation, with accompanying written reasons, from the general superintendent. Thus a probationary teacher or principal may be discharged or dismissed without a hearing. *People ex rel. Thomas* v. *Bd. of Ed. of City of Chicago,* 40 Ill. App.2d 308, 317, 188 N.E.2d 237, 242 (1963) ("There is no doubt that under sections 34-84 and 34-85 of the School Code a hearing in connection with a probationary discharge is not required."). This probationary period does

[10] This section was substantially modified by Public Act 80—1308, effective August 7, 1978; however, the provision that "no teacher or principal appointed by the board of education shall (after serving the probationary period of 3 years specified in Section 34-84) be removed except for cause" has been retained.

not begin until the actual appointment from an eligibility list. *Id.*

If Webster is correct in his contention, given the statutory gloss discussed above, it would mean that although the Board could have promoted Webster and then dismissed him without a hearing, the Board could not refuse to promote him without a hearing. Put differently, if Webster were to prevail on this point, it would mean that he would be entitled to a hearing if not promoted, but if promoted he would not be entitled to a hearing prior to dismissal. He would have the rights of a tenured, permanent principal before promotion but after promotion he would lose these rights for three years. A construction leading to such an absurd result cannot be correct, and the Illinois courts have said as much by refusing to count pre-appointment time served by temporary employees toward fulfillment of the probationary period.[11]

Despite the fact that no hearing would be required were he promoted and then dismissed, Webster maintains that he is nonetheless entitled to the promotion under state law and that this entitlement requires the due process of a hearing before deprivation. He bases this claim on the fact that section 34-84 of the School Code provides that promotions to principalships shall be made "for merit only," construing this point to mean that the Board has no choice but to appoint a candidate possessing a valid certificate from the Board of Examiners if a vacancy occurs when he comes to the head of the eligibility list

[11] *See, e.g., People ex rel. Thomas* v. *Bd. of Ed. of City of Chicago,* 40 Ill.App.2d at 313, 188 N.E.2d at 240:

> Illinois courts have specifically held that persons occupying positions in the public service and in municipal employment as mere temporary employees cannot, by performing such services as temporary employees, gradually acquire civil service or tenure rights; to permit such a practice would nullify the purposes of tenure laws.

or is nominated by a local committee. We do not find Illinois law to so confine the Board.

To begin with, the Illinois courts have recognized that the Board of Examiners of the Board of Education and the Board of Education itself "are two separate entities so created by [the] legislature. See Ill.Rev.Stats. (1965), c. 122, §34-2 (Board of Education) and § 34-83 (Board of Examiners)." *Crofts* v. *Bd. of Ed. of the City of Chicago,* 105 Ill.App.2d 139, 149, 245 N.E.2d 87, 93 (1969). The *Crofts* court pointed out that the mere fact that the Board of Examiners allowed only two categories of health classifications did not itself prevent the Board of Education from in effect establishing a third.

On the other hand, the Illinois courts have observed that the Board of Examiners and not the Board of Education is the body empowered to make rules governing the examination of candidates. *People ex rel. Cook* v. *Bd. of Ed. of the City of Chicago,* 295 Ill.App. 41, 14 N.E.2d 520 (1938). This is in accord with the purpose of the so-called Otis law, the 1917 revision of the School Code, which was to replace the spoils system with a merit system. *Id.* Yet another Illinos decision should be noticed in this context. In *Courtney* v. *Bd. of Ed. of the City of Chicago,* 6 Ill.App.3d 424, 286 N.E.2d 25 (1972), the appellate court ruled that a complaint challenging the action of the Board of Education in bypassing certain persons holding principal's certificates near the top of the eligibility list in favor of others nearer the bottom stated a valid cause of action. The facts were that certain persons who had held their certificates for a longer time and thus were at the top of the list were bypassed when the Board appointed others who had not held their certificates as long. But this decision does not state that any given person possessing a certificate is entitled to a principalship by virtue of reaching the top of the eligibility list. At most it means that the Board may not consider those lower on the list before considering those higher up. It

is a case involving priority of consideration and not entitlement to promotion.[12]

Although this case is currently *sub judice,* we need not await its outcome. As in *Courtney* the issue involved is priority of consideration as opposed to entitlement to position.

In order to resolve the questions before us we need not definitively decide what the phrase "for merit only" means in the Illinois law. It is sufficient if we can state with certainty that, whatever its meaning, it does not create an entitlement to a principalship under Illinois law, and that we can do. There is no indication that the Board of Education is merely a formalistic "rubber stamp" in the promotion process, which Webster's argument would require. Rather, there is every indication that, whatever the order it must consider them in, the Board of Education as a separate entity is to have the final word and power of promotion or denial over those candidates

[12] A similar case is currently under appeal in the Illinois courts. In *Maiter* v. *Chicago Bd. of Ed.,* No. 77-243 (appeal pending in the Appellate Court of Illinois, 1st Dist.), members of the Chicago Principals Association who either accepted appointments, had been offered appointments or were on the most recent principals' eligibility list awaiting appointment brought suit against the Board of Education challenging the procedures used by the Board by which it obtains, from a local school nominating committee, the nomination of a certificated candidate to fill a principalship vacancy. The suit thus challenges the system of community input set forth in section 34—8.2 of the School Code, which became effective October 1, 1977, whereby a nominating committee comprised of community members and parents interviews candidates on the eligibility lists when a principalship vacancy arises at a school and nominates a person or persons of its choice upon which the General Superintendent and Board act, either following the committee's recommendation or rejecting it. This was the procedure followed in Webster's case, which has not been challenged by plaintiff.

who have been certified to it by the Board of Examiners. The statute states that promotions shall be made by the Board, and by no other. That they are only to be made for merit and not for patronage reasons surely does not prevent the Board from exercising its judgment against the merits of a given applicant. There is thus no indication in Illinois law that possession of a certificate from the Board of Examiners means anything more than that one is to be placed on the eligibility list and considered at the appropriate time by the Board of Education. Claims of entitlement to promotion sufficient to evoke constitutional protection must be based on a surer footing.[13]

What we have said concerning Webster's claimed deprivations of procedural due process applies equally to any alleged substantive due process claims. *Jeffries* v. *Turkey Run Consolidated School Dist.,* 492 F.2d 1 (7th Cir. 1974) (Stevens, J.). "As this court has explicitly held, there can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or property right." *Eichman* v. *Indiana State University Board of Trustees,* 597 F.2d 1104 (7th Cir., 1979).

[13] Besides having a basis in state statutory or case law, a claim of entitlement may also be grounded on "rules or mutually explicit understandings." *Perry* v. *Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). These understandings, however, must be *mutually* explicit and must be such as Webster "may invoke at a hearing." *Id.* And they must be defined with reference to state law. *Id.* at 602 n. 7, 92 S.Ct. 2694, n. 7. Here, we find no mutuality of understanding, and as the foregoing discussion has shown with regard to sections 34—84 and 34—85 of the School Code, it would be absurd to conclude that state law provides for the right to a hearing before hiring but not afterward. Thus, not only is mutuality lacking here, but Webster's claim is inconsistent with the codified tenure and hearing provisions. *Cf. Eichman* v. *Indiana State University Board of Trustees,* 597 F.2d 1104 (7th Cir., 1979).

We treat as belonging to this substantive due process category Webster's contention that state law precluded the Board from in any way considering the fact of his arrest and the attendant circumstances. Webster seeks support in this regard from section 21-1 of the School Code, which provides that "[i]n determining good character under this Section, any felony conviction of the applicant may be taken into consideration, but such a conviction shall not operate as a bar to registration." Assuming, *arguendo,* that this provision is relevant, there was no absolute bar to registration here. Rather, the fact of and circumstances surrounding the arrest and indictment were taken into consideration by the Board. At any rate, there would seem to be a difference between an absolute disqualification based on the mere fact of arrest and consideration of events and circumstances leading up to and surrounding an arrest and subsequent indictment. Since presumably such events and circumstances in and of themselves could be considered if they had not eventuated in an arrest and indictment, the occurrence of an arrest does not itself render such consideration impermissible.[14] Nor is any presumption of innocence violated where, as here, no criminal liability or penalty is at issue. And to argue in this case that deprivation of a promotion is a penalty is circular: It would be no penalty if one were not entitled to the promotion, and to assume that one is so entitled assumes the very question at issue in deciding if constitutional due process protections apply.

Inasmuch as we are unable to say that Webster suffered the deprivation of any constitutionally protectable liberty or property interests, we reverse the conclusion of the

[14] Thus, for example, the fact that stolen property was found in Webster's possession would remain the same whether he was arrested or not. And the probativeness of this fact remains the same regardless of its exclusion from evidence in a criminal proceeding for Fourth Amendment policy reasons.

district court that the Fourteenth Amendment Due Process Clause was violated in this case.

III

We turn now to the issue presented by Webster in his cross-appeal, namely, whether the district court properly dismissed his claims based on alleged racial discrimination by the Board in violation of the Thirteenth and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983, 2000e-3, and 2000e-5.

The district court found that there was no evidence that Webster's race or color formed the basis of any action by or conduct of the Board of Education. We agree with this conclusion.

The district court intimated that there was a failure to prove a discriminatory intent on the part of the Board. Webster counters by stating that *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), substituted a showing of discriminatory impact or effect in place of an explicit showing of discriminatory intent. He also complains that he was deprived of the opportunity to show the discriminatory effect when the district court refused to hear evidence on the racially discriminatory impact of using arrest records to disqualify applicants from employment consideration.

The fault in Webster's argument is his failure to show a pattern or practice of use of arrest records by the Board. The *Griggs* substitution of impact or effect for intent is premised on the existence of a pattern or practice on the part of an employer. No such practice has been shown here. Instead, as has been discussed above, there was no absolute disqualification or refusal to consider Webster's application on the part of the Board because of the fact of the arrest. Rather, the Board considered the circumstances giving rise to and surrounding the arrest and concluded that it would not approve Webster's promotion. No pattern or practice having been

shown, the district court was correct in excluding evidence of the effect of such a putative practice.

Webster also contends that he has met the criteria for a *prima facie* case as established in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Assuming, *arguendo* that he did,[15] the district court was still correct in dismissing the discrimination claims on the merits. Webster concedes in his brief that the Board's reason for declining to promote Webster related to the Board's assessment of Webster's fitness to be a principal. (Brief of Cross-Appellant at 54.) As has been demonstrated above, the Board is charged with the final authority in assessing and approving promotions to the rank of principal. Webster claims, however, that the Board's decision to retain him as a teacher while denying him the promotion to principal cannot be a "legitimate, nondiscriminatory" one such as would rebut a *prima facie* showing under *McDonnell Douglas. See* 411 U.S. at 802, 93 S.Ct. 1817.

Even assuming that the standards for teachers and principals are the same, Webster's assertion that the Board's decision is arbitrary and thus discriminatory is not supported by the facts. The record shows that the Board reinstated Webster as a teacher following suspension as the result of the compromise and settlement of a pending mandamus action. This alone would seem to explain any logical discrepancy. Moreover, in evaluating

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[15] There is at least some question whether Webster has shown a *prima facie* case, which question we need not address in light of our treatment of the issue. We do note, however, that the Court in *McDonnell Douglas* placed this *caveat* on its four-pronged test for a *prima facie* Title VII case:

> The facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations.

411 U.S. at 802 n. 13, 93 S.Ct. 1817, n. 13.

the rebuttal of a *prima facie* case, it is appropriate to consider "subjective" criteria, *McDonnell Douglas, supra* at 803, especially when, as we have found here, the employer statutorily bears the final burden of fitness determination. Based on the foregoing, and on a lack of other evidence supportive of a claim of racial discrimination, we agree with the district court's dismissal of these claims on the merits.

In sum, the judgment of the district court dismissing plaintiff's claims of racial discrimination based on the Thirteenth and Fourteenth Amendments and on 42 U.S.C. §§ 1981, 1983, 2000e-3, and 2000e-5 is affirmed. The judgment of the district court in favor of the plaintiff based on his Fourteenth Amendment due process claims is reversed, and this portion of the case is remanded with direction to vacate the judgment. Costs are awarded to the defendants.